

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

UNITED FEDERATION OF TEACHERS
WELFARE FUND

EMPLOYER

and

Case No. 2-RD-1386

MARK IWASKYKLW

PETITIONER

and

UNITED INDUSTRY WORKERS, LOCAL 424,
A DIVISION OF UNITED INDUSTRY WORKERS,
INTERVENOR

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Gregory B. Davis, a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2. Upon the entire record in this proceeding, it is found that:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that the Employer is a domestic corporation with an office and place of business located at New York, New York, where it is engaged in the business of administering benefits to New York City teachers.¹ The record establishes

¹ An administrative law judge issued a decision and recommended order in Case No. 2-CA-28334 in which she found sufficient evidence to establish that the Employer is engaged in commerce and falls within the jurisdiction of the Board. The ALJ's decision asserts that the record establishes that the Employer meets the Board's jurisdictional standards, but does not specifically set forth any of the financial information.

that the Employer derives revenues in excess of \$10 million and also purchases and receives at its New York City facility, goods and services valued in excess of \$10 million directly from outside the State of New York.² Accordingly, based upon the record and the stipulation of the parties, I find that United Federation of Teachers Welfare Fund the Employer, is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Employer stipulated³ and I find that United Industry Workers, Local 424, A Division of United Industry Workers, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. Mark Iwaskyklw, an individual, filed the instant petition on September 12, 1996. The initial processing of the petition was blocked by the unfair labor practice charges in Case No. 2-CA-28334 et al that were the subject of litigation described above. At the conclusion of the unfair labor practice proceedings, this matter was scheduled for a hearing on September 24, 1999. As the incumbent Union, Local 424, had changed counsel within 24 hours of the hearing, the matter was rescheduled to September 30, 1999. As had occurred on the initial hearing date, Petitioner failed to appear at the rescheduled hearing.⁴ The sole issue raised at the hearing is whether or not the petition should be processed and an election conducted in the absence of the petitioner, an individual, who no longer is employed by the Employer. The record reflects that all attempts to contact Petitioner were unsuccessful both prior to the unfair labor practice trial and this hearing. The incumbent Union, Local 424, by letter of its counsel

² On November 15, 1993, the undersigned Regional Director, Region 2 of the National Labor Relations Board issued a certification of representation to Local 424 in Case No. 2-RC-21284.

³ The Administrative Law Judge in Case No. 2-CA-28334 similarly concluded that the Union satisfied the standards for a finding of labor organization status.

⁴ The Employer called Arthur Pepper, the Director of the United Federation of Teachers Welfare Fund, as a witness. Mr. Pepper testified that Petitioner Mark Iwaskyklw was employed by the Employer until about 18 months ago.

dated September 29, 1999, contends that the petition should be dismissed because the Petitioner has not appeared for the hearing. The Union contends that Petitioner “has not been employed in the bargaining unit for some period” and cannot be contacted either by the Union or the Region. Thus it urges that the petition be dismissed for a failure to cooperate. Counsel for the Employer contends, on the contrary, that the petition should be processed and an election conducted because the petition remains on file and has never been withdrawn. Counsel for the Employer, relying on *Saginaw Hardware Company*, 108 NLRB 955 (1954), further urges that the record establishes that there are other current employees who desire that the petition be processed.

The hearing officer called as witnesses three current employees of the Employer who were all employed in the bargaining unit covering the employees represented by Local 424. The first, John Cuccia, testified that he is a seven-year employee of the Employer who works as an administrative assistant. Mr. Cuccia testified that he came to the representation case hearing in order to ensure that an election is held on the issue of union representation. Valerie Modeste, a six-year employee who works as an administrative assistant to the Director of Retired Programs, testified that she is in the unit represented by Local 424 and that she desires an election on whether or not the union will continue as bargaining representative. Finally, Anthony Pollice, coordinator for Retiree Programs for Westchester, Rockland, and Putnam Counties, testified that he has been employed in the unit since 1990. He also testified that he would like to see an election be held.

Local 424 cited no cases in support of its position that the petition should be dismissed for failure of the individual petitioner to appear at the hearing. The Employer cites solely to *Saginaw Hardware Company* as support for its argument that the petition should be processed. In *Saginaw*, the individual who had filed the decertification petition withdrew it prior to an election. The Regional Director approved the withdrawal request.

Thereafter, 11 of the 12 employees on whose behalf the petition had been filed, contacted the Region and informed the Director that the petition had been withdrawn without their knowledge or consent. The Regional Director thereafter rescinded his approval of petitioner's withdrawal request and processed the petition. The Board in *Weyerhaeuser Timber Co.*, 93 NLRB 842 (1951) held that a petitioner's promotion to a supervisory position prior to the processing of the decertification petition does not serve to defeat the petition. In *Weyerhaeuser*, the Board noted that the petitioner was filing the petition on behalf of the employees of the employer on the issue of whether the union retained its status as exclusive representative and was not seeking any individual status or recognition. Thus in that case, the subsequent promotion of petitioner to a non-unit position did not serve to defeat the petition. A similar set of circumstances can be found in a more recent case that led the Board to the same conclusion. In *Harter Equipment, Inc.*, 293 NLRB 647 (1989), the Board stated that as the petitioner was a unit employee at the time of the filing of the petition and although he was subsequently was promoted to a non-unit position, the petition should proceed without abatement. These cases all stand for the principle that a decertification petition is filed on behalf of the unit employees and is not within the exclusive dominion or control of the individual who signed the petition. In this case, Mark Iwaskyklw filed this petition on September 12, 1996, after which time it was blocked by unfair labor practice charges for nearly three years. Current employees Cuccia, Modeste and Pollice all testified on the record that despite the absence of Iwaskyklw they wanted the petition to be processed. None of these employees indicated that they had authorized Iwaskyklw to withdraw the petition or otherwise let the matter drop. In these circumstances, it is appropriate for the petition to be processed to completion and I conclude that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2 (6) and (7) of the Act.

5. The Petition seeks an election in the following appropriate unit that was the subject of a certification of representation in Case No. 2-RC-21284 which issued on November 15, 1993 to United Industry Workers Local 424 a Division of United Industry Workers:

All full-time and regular part-time employees employed by the Employer, but excluding all employees covered by the collective-bargaining agreement between the Employer and Office & Professional Employees International Union, Local 153, AFL-CIO; all professional employees, supervisors and guards as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.⁵ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which

⁵ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

commenced more than 12 months before the election date and who have been permanently replaced.⁶ Those eligible shall vote on whether or not they desire to be represented for collective-bargaining purposes by the United Industry Workers, Local 424 a Division of United Industry Workers.⁷

Dated at New York, New York
October 26, 1999

Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Rm. 3614
New York, New York 10278

Code: 324-4060-2500

⁶ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB No. 50 (October 26, 1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **November 2, 1999**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁷ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 Fourteenth St., NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by **November 9, 1999**.